

EXHIBIT "A"

Form 88

**MOTION FOR JUDGMENT OF ACQUITTAL
OR IN THE ALTERNATIVE FOR NEW
TRIAL OR ARREST OF JUDGMENT**

CC 2002 134,136

Case Number

☒ State of Alabama
☐ Municipality of _____

STATE OF ALABAMA

In the Circuit Court
of Pike County

[The City/Town of _____]

v.
Kenny Price
Defendant

Defendant moves the Court to enter a judgment of acquittal in the above-styled action in favor of the defendant, or in the alternative, defendant moves the Court to set aside the judgment entered on Nov 8, ~~2002~~ and grant the defendant a new trial, or in the alternative, defendant moves the Court to arrest judgment on the following grounds:

(Here State Grounds)

1. Violation of Constitutional Right Amendment 6. A.C.C. (1975) 13A-5-37 (see attached).
2. Court erred, admitting illegally obtained (4th Amendment) evidence. Recording of wiretapping without a warrant (order). A.C.C. (1975) 13A-11-36 (see attached) U.S.C. Title 18, Part 1, Chapter 119, Section 2511.
3. Due process violation of withholding evidence that could have had major impact on verdict.
 - (a) Witness testified under oath that she had not been in any trouble since signing the C.I. Agreement. See copy of the arrest record attached (check dates)
4. Insufficient Indictment, violation of due process, Al A. Rule 13.1 (b) (see attached).

Jan 30, 2003
Date

SETH/Kenneth Price
Attorney for Defendant

4931 Co. Rd. 3339 #2
Address

Brundidge, AL 36010

Rules 20.3(c) and 24

EXHIBIT "A"

ORIGINAL

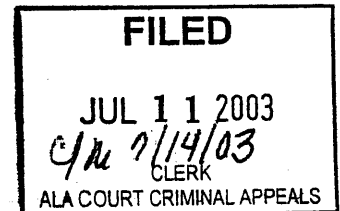
EXHIBIT "B"

CR-02-0947

**IN THE COURT OF CRIMINAL APPEALS
OF ALABAMA**

KENNY PRICE,
Appellant,
v.
STATE OF ALABAMA,
Appellee.

*
*
*
*
*



**APPEAL FROM AN ORDER OF
THE CIRCUIT COURT OF PIKE COUNTY**

**BRIEF OF APPELLANT
KENNY PRICE**

JULY 10th, 2003

BY:

**Lloyd W. Carr
SMITH & CARR, L.L.C.
Post Office Drawer 389
Elba, Alabama 36323
Phone: (334) 897-3658
Fax: (334) 897-8633
Attorney for Appellant**

NO ORAL ARGUMENT REQUESTED

EXHIBIT "B"

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STATEMENT OF THE CASE

The Defendant/Appellant Kenny Price was found guilty in the Circuit Court of Pike County, Alabama in CC 2002-134 and CC 2002-136 on November 3rd, 2002. Mr. Price was represented by counsel during said trial. A Motion for New Trial was filed on January 31st, 2003 and denied on February 3rd, 2003. Mr. Price was subsequently sentenced on February 3rd, 2003 to twenty five years in each count to be served consecutively. On February 20th, 2003 defense counsel filed a Motion to Withdraw, and said motion was granted and the undersigned counsel was appointed to handle the appeal.

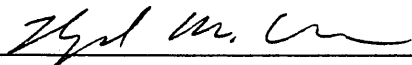
STATEMENT OF THE ISSUES

After a diligent study and research of the facts and the applicable law in the above-styled case, the undersigned counsel for the Defendant/Appellant can find no legal issue arguable on its merits that could be construed as unduly prejudicial or harmful to the substantive or procedural rights of the Defendant nor can I make any argument in good faith and conscience in the Appellant's favor that merits reversal.

CONCLUSION

Having concluded that this is a no merit appeal, the undersigned legal counsel has served the Defendant/Appellant with a copy of the record on appeal, and is contemporaneously herewith filing a Motion to Withdraw in this case.

Respectfully submitted this the 10th day of July, 2003.

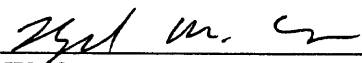


Lloyd W. Carr CAR137
Attorney for the Defendant/ Appellant

**OF COUNSEL:
SMITH & CARR, L.L.C.
Post Office Drawer 389
Elba, AL 36323
(334) 897- 3658**

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing Brief to Kenny Price, AIS# 150784, Defendant/Appellant, Donaldson Correctional Facility, 100 Warrior Lane, Bessemer, AL 35023; and the Attorney General for the State of Alabama, 11 South Union Street, 3rd Floor, Montgomery, Alabama, 36130 by U.S. First Class Mail, postage pre-paid on this the 1st day of July, 2003.



Lloyd W. Carr

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

KENNY PRICE,

*

APPELLANT,

*

VS.

*

CASE NO. CR 02-0947

STATE OF ALABAMA,

*

APPELLEE.

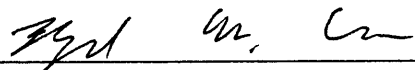
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*

MOTION TO WITHDRAW

COMES NOW Lloyd W. Carr, appointed attorney for the above-named Defendant/Appellant, and respectfully requests that this Honorable Court enter an Order granting him leave to withdraw as counsel of record. For grounds, the undersigned would show unto the Court that counsel for the Defendant believes the Defendant's appeal from the conviction and sentence imposed in the above-styled cause to be without merit.

Respectfully submitted this the 10 day of July, 2003.

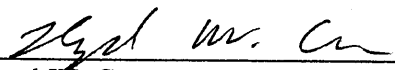


Lloyd W. Carr

OF COUNSEL:
SMITH & CARR, L.L.C.
Post Office Drawer 389
Elba, AL 36323
Phone: (334) 897-3658
Fax: (334) 897-8633

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing Motion to Withdraw to Kenny Price, Defendant/Appellant, #150784, Donaldson Correctional Facility, 100 Warrior Lane, Bessemer, Alabama 35023; and the Attorney General for the State of Alabama, 11 South Union Street, 3rd Floor, Montgomery, Alabama, 36130 by U.S. First Class Mail, postage pre-paid on this the 10th day of July, 2003.



Lloyd W. Carr

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
JUDICIAL BUILDING, 300 DEXTER AVENUE
P.O. BOX 301555
MONTGOMERY, AL 36130-1555

EXHIBIT "C"

H. W. "Bucky" McMILLAN
Presiding Judge
SUE BELL COBB
PAMELA W. BASCHAB
GREG SHAW
A. KELLI WISE
Judges

Lane W. Mann
Clerk
Wanda K. Ivey
Assistant Clerk
(334) 242-4590
FAX (334) 242-4689

ORDER

CR-02-0947

Kenny Price v. State of Alabama (Appeal from Pike Circuit Court: CC02-134;
CC02-136).

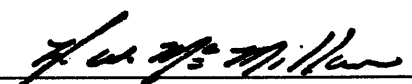
Counsel for the appellant in the above referenced cause has filed a no-merit brief and a motion to withdraw as required by Anders v. State of California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Counsel has also advised this Court that the appellant was served a copy of the no-merit brief and furnished with the appellant's copy of the record on appeal.

Upon consideration of the above, the Court of Criminal Appeals hereby ORDERS as follows:

The appellant shall have until August 4th, 2003, to serve the appellant's counsel and this Court with a list of each and every point or issue the appellant wishes to have considered in this appeal.

If, by August 4th, 2003, the appellant fails to identify any additional issues or points to be considered on appeal, the Court will then determine what action should be taken pursuant to Anders v. State of California, and will notify the appellee when and if a brief will be required.

Done this the 14th day of July, 2003.



H.W. "Bucky" McMILLAN, PRESIDING JUDGE

CCA/di

cc: Honorable Lloyd W. "Will" Carr, Attorney, Appellant
Kenny Price, Pro Se, Appellant
Office of Attorney General

07-17-03AC9:44 RCVD

EXHIBIT "C"

Alabama Court of Criminal Appeals Docket Sheet**CR-02-0947****APP : State Conviction****CR-02-0947****Kenny Price v. State of Alabama (Appeal from Pike Circuit Court: CC02-134; CC02-136)****Sentence Date**

02/03/2003

Conviction Date

11/08/2002

Sentence

25 yrs. (on each conviction, consecutive), \$1,000 demand reduction assessment, \$100 D.F.S. fee, \$50 CVF, attorney's fees (in each case)

Conviction

Unlawful Distribution of a Controlled Substance (2 counts)

Indigent**Notice of Appeal : 02/13/2003**Docketed 02/20/2003 DI
Last Updated / /**Post Judgment Motions**

02/03/2003 Motion for New Trial; Denied on 02/03/03

Attorneys & Officials

Circuit Judge	Steven E. Blair	Enterprise, AL (334) 393-2949
Circuit Judge	Gary L. McAliley	Enterprise, AL (334) 347-4785
Circuit Clerk	Brenda M. Peacock	Troy, AL (334) 566-4622
Ct. Reporter	Sheila Hanson	New Brockton, AL (334) 347-4785
Atty. for Aplt.	Lloyd W. "Will" Carr	Elba, AL (334) 897-3658
Atty. for Aplt.	James N. Thomas, WITHDRAWN	Troy, AL (334) 566-2181
Pro Se Aplt.	Kenny Price	Bessemer, AL (205) -
Asst. A. G. for Aple.	Jean-Paul M. Chappell	Montgomery, AL (334) 242-7328

Case Actions / Postings

01/31/2003 MNT filed in circuit court, effective 02/03/2003, date of sentencing.

02/20/2003 Docketing Notices sent. (11/5/02 rev.)

02/20/2003 DEF. NOTICE : RPTR'S TRANSCRIPT ORDER.

02/27/2003 RTO received.

03/03/2003 Amended clerk's notice of appeal reflecting appellant sentenced on 02/03/2003 to 25 yrs. on each conviction.

03/10/2003 Copy of Judge Blair's 3/5/03 order allowing attorney James N. Thomas to withdraw and appointing attorney Lloyd W. "Will" Carr to represent appellant on appeal. Docketing notice/fee forms sent to attorney Carr.

04/08/2003 TC Ext. of 28 days to file Comp. of Reporter's Tran.; Due 05/08/03 (Hanson).

05/05/2003 AC Ext. of 28 days to file Comp. of Reporter's Tran.; Due 06/05/03 (Hanson).

06/05/2003 Comp. of Reporter's Transcript Certified (Hanson).

06/11/2003 AC Ext. of 14 days to file Record on Appeal; Due: 06/26/03

06/27/2003 Certificate of completion and transmittal of record dated 6/25/03 (no roa to date).

07/01/2003 Record on Appeal Filed; Volumes: 2. Date of Certificate : 06/11/03

07/02/2003 BRIEFING NOTICE SENT TO PARTIES.

07/07/2003 Ext. of 7 days to file Appellant's Brief; Due: 07/16/03 (Carr).

07/11/2003 Appellant's No Merit Brief Filed; Copies: 5 (Carr). —————→ 8pgs. x .50¢ = \$4.00

07/14/2003 Anders Order Issued. Aple.'s briefing time stayed.

07/21/2003 Motion for appointment of counsel filed by appellant. (rec'd 7/23/03)

EXHIBIT D

Case Actions / Postings

07/23/2003 Letter to appellant advising he has counsel, Mr. Carr.

07/28/2003 Motion for extension of time to file brief filed by appellant. (rec'd 7/29/03)

07/30/2003 Time for filing pro se issues extended to 8/11/03.

08/01/2003 Appellant's Pro Se Issues Filed; Copies: 1 (Price).

08/05/2003 Case Automatically Assigned & Delivered to Judge

08/05/2003 Submitted under Anders Procedure

08/25/2003 Appellee's motion for 7-day extension to file its brief, filed by Jean Paul Chappell. (Sent to file. Assistant A.G. Chappell advised by telephone that no brief is due unless ordered by the Court as this case was submitted pursuant to Anders procedure.)

11/21/2003 Affirmed by Memorandum (McMillan) (Memo.)

11/26/2003 Letter from appellant asking if State filed a brief, filed. (rec'd 12/1/03)

12/01/2003 Application for Rehearing Filed.

12/02/2003 Letter to appellant advising State did not file brief.

12/12/2003 Application for Rehearing Overruled.
Cobb, J. Concurr, Baschab, J. Concurr, Shaw, J. Concurr, Wise, J. Concurr

12/12/2003 Parties notified that: Application for Rehearing Overruled.

12/26/2003 Petition for Certiorari Filed w/AL SC. SC Case # : 1030509.

08/13/2004 SC - Writ Denied - No Opinion . **SC Case #**
: 1030509.

08/13/2004 SC - Certificate Of Judgment Issued . **SC**
Case # : 1030509.

08/13/2004 Certificate of Judgment Issued

END OF DOCKETING INFORMATION

EXHIBIT "E"

Court of Criminal Appeals

State of Alabama
Judicial Building, 300 Dexter Avenue
P. O. Box 301555
Montgomery, AL 36130-1555

July 23, 2003

H. W. "BUCKY" McMILLAN
Presiding Judge
SUE BELL COBB
PAMELA W. BASCHAB
GREG SHAW
A. KELLI WISE
Judges

Lane W. Mann
Clerk
Wanda K. Ivey
Assistant Clerk
(334) 242-4590
Fax (334) 242-4689

Mr. Kenneth Price
AIS #150784
100 Warrior Lane
Bessemer, AL 35023

RE: CR-02-0947
Kenny Price v. State

Dear Mr. Price:

This is in response to your motion for appointment of counsel. Please be advised that Mr. Lloyd W. Carr is now representing you on this appeal.

We have contacted the circuit clerk's office regarding the correct spelling of your name. We use the spelling that is listed on the indictment which is Kenny.

Sincerely yours,



LANE W. MANN, CLERK
COURT OF CRIMINAL APPEALS

LWM/jz

cc: Honorable Llooyd W. "Will" Carr
P. O. Drawer 389
Elba, AL 36323

EXHIBIT "E"

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
JUDICIAL BUILDING, 300 DEXTER AVENUE
P.O. BOX 301555
MONTGOMERY, AL 36130-1555

EXHIBIT "F"

H. W. "Bucky" McMILLAN
Presiding Judge
SUE BELL COBB
PAMELA W. BASCHAB
GREG SHAW
A. KELLI WISE
Judges

July 30, 2003

Lane W. Mann
Clerk
Wanda K. Ivey
Assistant Clerk
(334) 242-4590
FAX (334) 242-4689

NOTICE

CR-02-0947

Kenny Price v. State of Alabama (Appeal from Pike Circuit Court:
CC02-134; CC02-136).

You are hereby notified that the following action was taken
in the above cause by the Court of Criminal Appeals:

On pro se motion of the appellant, the time for filing the
appellant's pro se issues is extended to August 11, 2003.

Lane W. Mann, Clerk
Court of Criminal Appeals

LWM/wki

cc: Honorable Lloyd W. "Will" Carr, Attorney, Appellant
Kenny Price, Pro Se, Appellant
Office of Attorney General

EXHIBIT-"F"

Exhibit G (Appellant Brief)

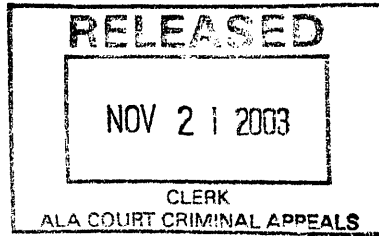
HANDWRITTEN
DOCUMENT
IS NOT SCANNED.
IT IS FILED
IN CONVENTIONAL FORMAT
AND AVAILABLE FOR VIEWING
IN THE CLERK'S OFFICE.

Exhibit H

Court of Criminal Appeals

State of Alabama
Judicial Building, 300 Dexter Avenue
P. O. Box 301555
Montgomery, AL 36130-1555

H.W. "BUCKY" McMILLAN
Presiding Judge
SUE BELL COBB
PAMELA W. BASCHAB
GREG SHAW
A. KELLI WISE
Judges



Lane W. Mann
Clerk
Wanda K. Ivey
Assistant Clerk
(334) 242-4590
Fax (334) 242-4689

MEMORANDUM

CR-02-0947

Pike Circuit Court CC-02-0134 & -0136

Kenny Price v. State

McMILLAN, Presiding Judge.

The appellant was found guilty of two counts of unlawful distribution of a controlled substance. The trial court sentenced him, as a habitual offender with five prior felony convictions, to two consecutive terms of 25 years' imprisonment. The court also suspended his driving privileges and ordered him to pay a \$1,000 demand reduction fee, a \$100 forensic fee, a \$50 crime victims assessment, court costs and attorney fees.

The appellant, pro se, filed written notice of appeal. His trial counsel was permitted to withdraw, and a new counsel was appointed for appeal. The appellate counsel has filed a brief in substantial compliance with Anders v. California, 386 U.S. 738 (1967), in which he states that he believes that this appeal is without merit. The appellant has submitted two

EXHIBIT "H"

EM

issues for this court's consideration: whether the evidence was sufficient to support the guilty verdict and whether his trial counsel was ineffective, based upon fourteen alleged "wrongs."

A review of the record reveals that both of the appellant's claims are without merit and that there is no other issue which warrants review on appeal. Therefore, the judgment of the trial court is affirmed.

AFFIRMED.

Cobb, Baschab, Shaw, and Wise, JJ., concur.

Lane W. Mann
Clerk
Wanda K. Ivey
Assistant Clerk



P. O. Box 301555
Montgomery, AL 36130-1555
(334) 242-4590
Fax (334) 242-4689

December 12, 2003

CR-02-0947

Kenny Price v. State of Alabama (Appeal from Pike Circuit Court: CC02-134; CC02-136).

NOTICE

You are hereby notified that on December 12, 2003 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

**Lane W. Mann, Clerk
Court of Criminal Appeals**

cc: Hon. Brenda M. Peacock, Circuit Clerk
Lloyd W. "Will" Carr, Attorney
/ Kenny Price, Pro Se
Jean-Paul M. Chappell, Asst. Atty. Gen.

EXHIBIT "I"

IN THE ALABAMA SUPREME COURT
EXHIBIT "J"

KENNY Price
Appellant

VS.

STATE OF ALABAMA

CASE # _____

MOTION TO FILE LESSER NUMBER OF COPIES

COMES THE APPELLANT, KENNY PRICE, AND
MOVES THIS COURT FOR PERMISSION TO FILE
A LESSER NUMBER OF COPIES OF APPELLANT'S
REPLY BRIEF PURSUANT TO RULE 31, A.R.A.P.

AS GROUNDS FOR THIS REQUEST THE
APPELLANT AVERS:

1.) HE IS AN INDIGENT INMATE AND CANNOT
AFFORD TO FACILITATE COPIES. HE CAN ONLY
SEND 1 COPY TO THE CLERK.

Respectfully submitted on this _____ DAY
OF _____, 2003

EXHIBIT "J"

IN THE SUPREME COURT OF ALABAMA

KENNY PRICE APPELLANT, VS. STATE OF ALABAMA APPEELEE	CRIMINAL APPEAL NO. CRO2-0947
--	----------------------------------

PETITION FOR CERTIORARI

Comes now the Appellant in the above styled cause and respectfully petitions this Honorable Court pursuant to Rule 39 of the ALABAMA RULES OF APPELLATE PROCEDURE for a Writ of Certiorari in this matter. Further, the Appellant respectfully moves, pursuant to Rule 39(K) of the Alabama Rules of Appellate Procedure, that this Honorable Court correct or amend the facts as stated in the Opinion of the Court of Criminal Appeals. As grounds therefor Appellant respectfully submits as follows:

1. The Court of Criminal Appeals erred in its Conclusion that the evidence presented at

IN THE SUPREME COURT OF ALABAMA

KENNY PRICE,
APPEALANT,

VS.

STATE OF ALABAMA,
APPEALLEE,

CRIMINAL APPEAL NO.

CR02-0947

APPEAL FROM THE CIRCUIT COURT
OF PIKE COUNTY, ALABAMA
CASE NUMBER CC02-134, 136

PETITION FOR WRIT OF CERTIORARI
AND BRIEF IN SUPPORT

SUBMITTED BY :

KENNY PRICE, PRO-SE
AIS #150784 BED-7
100 WARRIOR LANE
BESSEMER, ALABAMA

35023

IN THE SUPREME COURT OF ALABAMA

Kenny Price
Defendant
VS.

STATE OF ALABAMA

CRIMINAL APPEAL,
NO. _____

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Brief upon the Attorney General for the State of ALABAMA by placing a copy of the same in the United States Mail, properly addressed and postage prepaid on this _____ day of _____ 2003.

Kenny Price 150784
Pro-SE
Defendant

Served on,
Attorney General
Alabama State House
11 S. Union Street
Montgomery, Alabama 36130

Statement OF The Facts Pursuant To Rule 39(K)
OF The Alabama Rules OF APPELLATE Procedure

Mr. Price respectfully submits that the facts should reflect that the trial counsel performance was Ineffective.

trial is sufficient to sustain Mr. Price's Conviction. This conclusion is in conflict with the Published opinion of this Honorable Court in Ex parte Presley, 587 So.2d 1022 (Ala.1991), which states "The burden of Proof, as that term is properly used, does not shift to the defendant. It remains on the State to prove every element of the offence charged in order to establish the defendants guilt beyond a reasonable doubt." Id. at 1025. To the extent that Friedman v. State, 654 So.2d 50 (Ala. Cr. App. 1994), is in conflict with the decision of this Honorable Court in Ex parte Presley, 587 So. 2d 1022 (Ala.1991), the former is due to be overruled.

Whether the Lower Court erred in Affirming the conviction when Appellant raised 14 issues on Ineffective Assistance of trial Counsel. Strickland vs. Washington 466 U.S. 668, 80 L. Ed. 2d 693,

INTRODUCTION

This case presents a Petition for Writ of Certiorari. The Opinion of the Court of Criminal Appeals was released on November 21st, 2003. A copy of that Opinion is attached hereto as an exhibit.

The record on appeal consists of the Clerk's record, which will be referred to as "C" followed by a page number, and the reporter's transcript, which will be referred to as "R" followed by a page number. The appellee will be referred to as "The State" or "the prosecution". The appellant will be referred to as "The defendant" or "Mr. Price".

ISSUE PRESENTED FOR REVIEW

The following issue is presented to this court for review.

1. Whether the Court of Criminal Appeals erred in its conclusion that the trial Counsel was effective in his performance.

Argument

Whether the Electronic Evesdropping was legally done, to obtain the tape recording that was used as evidence in the defendants trial.

Whether the trial Counsel was *INEffective* in laying proper foundation to discredit informants testimony.

After Trial, The Defendant was given evidence to show that the Informant was not a reliable Informant, and if trial Counsel had laid proper foundation, The Informant would not have been allowed to Testify. The Informant signed a contract (see copy attached as exhibit A) to work with the 12th Judicial Task Force on Sept. 6th, 01.

Then on Sept. 10th, 01, (see copy attached as exhibit B) Just 4 days later, the Informant was arrested for (4) four Charges dealing with Illegal drugs. (also see enclosed clipping from Newspaper as exhibit C) The Informant was charged with manufacturing methamphetamine (1st) first degree as well as possession of marijuana (2nd) second degree

Title III, Omnibus crime control and Safe Streets Act of 1968, 18 U.S.C. 2510 et seq. This comprehensive Federal statute makes unauthorized electronic surveillance a serious crime. The general rule under the statute is that official eavesdropping and wiretappings are permitted only with probable cause and a warrant (order.) see. Alderman vs. United States 394 U.S. 165 (1969)

Also, Title III includes an exclusionary rule, illegally intercepted communications may not be introduced as evidence in any trial or hearing. It applies to state courts as well as federal courts.

The Trial Counsel was ineffective by not laying proper foundation to exclude illegally obtained tape recordings by electronic Eavesdropping without first obtaining a warrant (order) see. Alderman vs. United States, 394 U.S. 165 (1969)

Whether the Lower Court erred in its ruling on the defendant's motion filed on 1-30-03 (C-56-72) on electronic eavesdropping without a Warrant (order)

The defendant repeatedly asked his lawyer to file a motion to suppress the illegally obtained evidence of tape recordings done by electronic eavesdropping without a warrant (Order) see. Alderman vs. United States 394 U.S. 165 (1969)

When the defendant's lawyer would not file a motion to suppress the illegally obtained evidence, The defendant with little knowledge of preparing a motion, filed a motion for Judgment of Acquittal or in the alternative for new Trial or arrest of Judgment on 1-30-03 (C-56-72)
The defendant's motion was denied.

TABLE OF AUTHORITIES

CASES CITED

Ex parte Presley, 587 So.2d 1022 (Ala.1991) ...

Friedman v. STATE, 654 So.2d 50 (Ala. Cr. App. 1994)...

Strickland v. Washington, 466 U.S. 668,
80 L. Ed. 2d 693

Title III, Omnibus crime control and safe
Streets Act of 1968, 18 U.S.C. 2510
et seq.

Alderman v. United States, 394 U.S. 165
(1969)

IN THE SUPREME COURT OF ALABAMA



August 13, 2004

1030509

Ex parte Kenny Price. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Kenny Price v. State of Alabama) (Pike Circuit Court: CC02-134; CC02-136; Criminal Appeals : 020947).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

Writ Denied - No Opinion

BROWN, J., - Nabers, C.J., and See, Harwood, and Stuart, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 13th day of August, 2004

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

EXHIBIT "L"

GROUND VII

PETITIONERS TRIAL AND SENTENCING PROCEEDINGS WAS PREJUDICED BY MULTITUDINOUS INDICTMENT, AND USED AT SENTENCING PHASE OF SAID, JOINED WITH MULTITUDINOUSLY USED PRIOR CONVICTIONS, VIOLATED CONSTITUTIONAL GUARANTEES AGAINST CRUEL AND UNUSUAL PUNISHMENTS.

STATEMENT OF THE FACTS

(1) The March 2002 Grand Jury Term of Pike County Alabama, returned an indictment against petitioner charging petitioner with unlawful distribution of a controlled substance, in violation of 13A-12-211 of the Alabama Code.

Thus an indictment charging petitioner for a single offense in three different counts.

(ii) This indictment was presented to the petit jury to decide the petitioners innocence or Guilt, (R-4A..Ln:25,-R-7A. Ln:23.) as to whether the petitioner did or did not sell a controlled substance to a confidential informant, Angela Brock, as alleged at trial on the 18th, 19th, 20th, of September, of 2001.

(iii) Thus an indictment based on the same facts, agreements and scheme and resulting in petitioners receiving two twenty five year sentences to run consecutive.

(iv) In addition to the above, petitioners sentence was improperly enhanced as having five prior convictions, based on a plea agreement containing the five prior charges which resulted in only one conviction.

EXHIBIT "L"

SUMMARY OF RELEVANT FACTS

CURRENT CHARGE

(v) In regards to no(i) above, as described and demonstrated in Ground two above, Task Force Agent, Williamson (hence forth, "Williamson") provided confidential informant, Angela Brock, (hence forth "Brock") with fifty dollars in United States currency, instructing Brock to locate and purchase a "half" gram of methamphetamine, a controlled substance from petitioner.

Williamson, having affixed an eavesdropping device to Brocks person, and a transmitting device, in Brock truck, was tape recording alleged drug transactions between petitioner and Brock, via radio frequency and reciever divice from within the confines of petitioners home, alleged to have occured on the 18th, 19th, and 20th, day of September, 2001,

Brock was alleged to have returned after each said recorded visit to petitioners home, and provided williamson with one vial of methamphetamine, alleged to have been purchased by Brock from the petitioner, on said dates, where after, Williamson would then mark the methamphetamine, and tape recording for identification, analysis and evidence which resulted in said indictment (i, above)

As described in Ground .3.. above, the alleged transaction which was to have occurred on the 19th, day of September, 2001 identified by the trial court as cc-2001-135, was mistrialed but petitioners girlfriend identified as co-defendant, of which resulted in mistrial for petitioner, however the other two counts cc-2001-134, cc2001-136, petitioner was found guilty of and sentenced to two twenty five year sentences to run consecutively. (iii, above)

SUMMARY OF FACTS

PRIOR CHARGE.

(vi) In regards to (iv) above, petitioner was charged in 1988, with first degree sodomy, X-1 ; first degree sexual abuse, X3; and second degree sexual abuse. involving the same victim and on the same date.

Petitioner made plea with the court of guilty, resulting concurrent statis, and recieved one twelve year conviction, serving a five year sentence there on. (C-74-75.); (R-272, Ln:17, -R-283, Ln:9)

A.

ISSUE PRESENTED AND ARGUMENT

WHETHER PETITIONERS INSTANT INDICTMENT WAS MULTIPLICIOUS
AND CREATED UNCONSTITUTIONAL PREJUDICE UPON PETITIONERS
TRIAL AND SENTENCING PROCEEDING

As described above, (i) petitioner was accused and tried under an indictment alleging a violation of 13A-12-211, unlawful distribution of a controlled substance, of which indictment specifically provides as follows:

....."The Grand Jury of said county charge that before the finding of this indictment that,

KENNY PRICE

Who's name is to the Grand Jury otherwise known, Did unlawfully sell, furnish, give away, manufacture, deliver or distribute a controlled substance, to wit: Methamphetamine, in violation of section 13A-12-211, of the Alabama Code, against the peace and dignity of State of Alabama; and,

OFFENSE TWO

same; and,

OFFENSE THREE

same).

See indictment, (C-11.)

Thus, an indictment alleged a single offense in three courts, and does not state the precise date, etc., at which, or on which of the offenses is alleged to have been committed, as demonstrated below, was a material ingredient of the offense(s) alleged against petitioner.

Indictment charging a single offense in different counts are multiplicitious, see: U.S. V. Powell, 894 F2d 895, 897, -98 (7th cir. 1990) noting that "Indictment charging conspiracy to distribute cocaine and methamphetamine as two separate counts multiplicitious because each count based on same facts and agreement. "see also, U.S. V. Corona, 108 F3d 565, 573-74 (5th. cir 1997)).

In this instant case, as described above, (v. above), petitioner was alleged to have sold, Brock, a half Gram. of methamphetamine, being purchased by Brock, with funds (\$50.00) provided by Williamson, of which purchase, or transactions were being recorded, and drugs purchased by Brock were provided to Williamson on each occasion. (ii., above)

However, the indictment in this cause simply does not refer to any material time, place, or date, yet alleges only that petitioner is charged with three counts of the same offense.

Certainly, multiplicitious on its face as it would require proof of identical facts.

The court in U.S. V. HandaKas, 286 F3d 92,98(2nd cir. 2002) recognized that "Indictments listing two counts, each charging tax evasion scheme over distinct one year period, was multiplicitious when both periods were part of the same scheme violating statutory provisions".

In this instant case, again, the indictment in this case does not allege a specific date for either count alleged, however as described above, and as record will reflect, (ii,v,above) Williamson and Brock, performed the same exact method of allegedly obtaining evidence during the course of three adjoining days, during the same investigation, and there by subjecting petitioner to allegedly participate in a continuing scheme created by Williamson to ensure petitioner into selling a narcotic.

Although the date's may be distant of three adjoining days, it was certainly not alleged in the indictment, and part of a continuing unlawful scheme created by law-enforcement officer Williamson, as described above and in Ground Two above.

Further, recognizing another important factor, the court in U.S. V. Dixon, 273 F3d 636,642 (5th.cir.2001) render that, "Two Robbery counts in the same indictment was not multiplicitious when each count refers to different victims,"

In this instant case, the indictment does not allege a victim, however, as described above (v.) and the record will reflect (ii,above), that Brock would be the "victim" on each said occasion, who allegedly purchased a controlled substance from petitioner, and thus a case based on a multiplicitious indictment,

The U.S. Supreme Court in, U.S. V. Blockburger, 284 U.S. 299, 304 (1932) held, that, "Double Jeopardy Bars subsequent prosecutions for a single act unless the act can be prosecuted and punished under different statutory provisions that require proof of different elements.

In this instant case, petitioner specially demonstrates above, that the indictment alleges a single violation of 13A-12-211, Code of Ala, in three counts (c-11); (i, above) of which offenses require proof of identical facts, (ii, above) of which facts petitioner demonstrates above (v. above) and no other required proof was available to prosecute this case, and thus herefore, petitioner being tried under said indictment (i, above) was in violation of the constitutional Double Jeopardy provisions.

In a similar case as thus, U.S. V. Elliot, 849, F2d 886, 890 (4th. cir. 1988), the court rendered that "Although multiple acts of physical delivery of a controlled substance technically distinct, because they occurred essentially at the same time, same place, and involved the same participants, must be considered a single offense under statute prohibiting participation in any aspect of distribution chain."

In this instant case, petitioner was accused under the unlawful distribution of a controlled substance statute of the Alabama Code (i, above) again which was alleged to have occurred essentially at the same time, (technically distinct, U.S. V. HandaKas, id.) at the same place, and involved the same participants, Powell, id. Corona, id. (v. above) and must have been tried as a single offense.

Further, The courts in U.S. V. Dixon, 921 F2d. 194 196 (8th. cir. 1990) rendered that a multiplicitious indictment charging two contemptuous counts of possession of cocaine could have suggested to the jury that the defendant committed more than one crime."

In this instant case, there is no doubt, as described above (ii, iii), the trial record will reflect that the petitioner jury was persuaded by the petitioners said indictment (i, above) that the petitioner committed more than one offense.

In fact, as described in Ground. 6.. above prosecutor

of this case, Mr. Jerell, supplants this thought in the jurys minds in opening arguments, that petitioner alleged actions allege a co-defendant, cumulation of extraneous exposure used to create prejudicial display of more than one offence.

Certainly, thus , in cumulation with the multiplicitious in the petitioners indictment indictment creating a substantial impact on two of the three alleged offence's of which neither of the three counts were supported by any evidence in this case. (Ground three).

The court in U.S. V. Brandon, 17 F3d 409, 422(1st cir.1994) points out that a Multiplicitious indictment violates double jeopardy clause, because it raises danger that the defendant will recieve more than one sentence for a single crime".

In this instant case, petitioner believes he has above demonstrated a concise demonstration of facts that petitioners constitutional Double jeopardy provisional guarantee have been wrongfully trampled by the state, and its multiplicitious indictment against petitioner .

And there is no doubt that the resulting danger of said multiplicitious indictment caused the petitioner to recieve two twenty five consecutive sentences for one alleged offense. Final, The Supreme Court of the United States held that the proper way to remedy a multiplicitious conviction is to vacate all but one conviction. see Ball V. U.S. 856,864-65(1985)

Herefore, for the afore-demonstrated reason, petitioners twin court of cc-134, or cc-136, is due to be vacated and existing only one said, conviction; or with respects the entirety of demonstrated violations demonstrated in all other Grounds hereto, a vacated conviction on both said counts, are warranted.

B. WHETHER CONSTITUTIONAL DOUBLE JEOPARDY PROVISIONS
WERE VIOLATED BY USE OF MULTIPLICIOUSLY USED
PRIOR CONVICTION AT SENTENCING ENHANCING

Petitioner contends that his sentence was improperly enhanced as having five prior convictions, when five 1988 charges, resulted in only one twelve year conviction based on a guilty plea agreement. (vi,above)

Thus objected to at sentencing by Thomas, (Trial counsel) as having only one case number, and should be consider
* one conviction. (R-277;Ln: 23)

(1.) The state contends that petitioner 1988 Guilty Plea Conviction contained 1, First degree sodomy offense, (class A Felony); 3, First degree Sexual Abuse offense, (class,C.Felony); 1, second degree Sexual Abuse offense. (class,A misdemeanor or)and therefore even though this case was consolidated into one 12-year conviction, petitioner should be class as having five prior conviction, for the purpose of habitual offender status.

(ii) Thus petitioner believes that he was graciously sentenced to two 25-year sentences to run consecutively, pursuant to the status of 13A-5-9,(C),(2), which specifically provides as follows:"(c) In all cases where it is shown that a criminal defendant has been previously convicted of any three felonies and after such convictions has committed another Felony he must be punished as follows.... On a conviction of a Class B Felony he must be punished for life in the penitentiary.

(iii) Petitioner in this case, was facing sentencing under two above described multiplicitious class B Felony ; constitutional due to be considered as one felony,(A above)

- (iv) In Burgess V. State, 412 S02d. 299 (Ala.Crim.App. 1982) "the court held that , Seven Guilty pleas in one trial considered one conviction under 13A-5-9, a conviction must be used to enhance punishment only when it is followed by commission of another felony.

Where a defendant commits no offenses after any of his seven guilty pleas, separately received in one trial, the court misapplies this section in considering each guilty plea a conviction that can be used to enhance punishment,"

In this instant case, as demonstrated above, (B.(i) above) (summary of facts; Prior charge ,VI,above) petitioner made Five guilty pleas separately received in one trial, thus petitioner as well receiving only one 12-year conviction there from, identified as CC88-076, Pike Co. Ala. which involved the same victim, and on the same date.

Thus, a conviction as so identified in presentence report. (C-98-page: seven.) Reflecting, one conviction. (1(v),above)

- (v) As objected to at sentencing (B.above) Petitioner respectfully disagrees with said conviction; being considered as Five priors, when only one prior conviction exists (iv.above)

Petitioner received two twenty five year consecutive sentences for two of the three offenses alleged against petitioner (iii,above)

Thus, of which petitioner believes he was sentence under the Habitual Offenders Act.13A-5-9,(c)(2) which provides: "In all cases when it is shown that criminal defendant has been previously convicted of any three felonies after such convictions has committed another felony, he must be punished for life in penitentiary.

Certainly as petitioner received two twenty five year sentences would be most gracious, however, petitioners contends that the habitual offenders act was misapplied in respects of Bergess,id.

The records reflect that petitioners prior conviction status reflects one prior conviction (iv.above) which would subject petitioner to the provisions of 13A -5-9.(a) (2) which in pertinent part provides that after it is shown that a criminal defendant has been previously convicted of any felony ,and after such conviction has committed another felony, he must be punished as follows:.....
(2) On a conviction of a class B Felony, he must be punished for class A Felony.

thus, petitioner was convicted of a class B.Felony, unlawful distribution of a controlled substance. 13A-12-211(b);and

Thus, pursuant to 13A-5-6 (a) (i), would carry a sentence for " life or not more than 99 years or less than 10 years." with 1-prior conviction.

However, the provisions of 13A-5-4(a) also apply in petitioners sentencing status in question, which provides as follows:

"The particular classification of each Felony defined in this title, except murder under section 13A-6-2, is expressly designated in the chapter or article defining it. Any offenses defined outside this title which is declared by law to be a felony without specification of its classification or punishment , is punishable ad a class C felony."

In this instant case, petitioners indictment charges unlawful distribution of a controlled substance, and stipulates "METHAMPHETAMINE" as a controlled substance alleged to have been distributed. (C-37)

Thus, the indictment does not allege 13A-12-216, authorizing the provisions of Title 20-2-20,through 20-2-31,defining the classification of methamphetamine as a controlled substance offence in this case, and therefore the classification of the particular felony is not specifically defined in the sentencing scheme of 13A-12-231, nor invoked pursuant to 13A-12-216, by the state and herefore must be corrected that petitioner committed a class "C" felony, pursuant to the provisions of 13A-5-4(a) and

Thus, entitling petitioner to the sentencing provisions of 13A-5-9,(a)(1),providing inpertinent part that "On a conviction of a class"c" felony , he must be punished for a class "B" felony and thus, pursuant to 13A-5-6,(a)(2), provides a sentence for a class "B" felony to " not more than 20-years or less than 2 years".

For the afore mentioned reasons, to calculate petitioners as having five prior convictions would result in a multiplicious sentence enhancement, and thereby cruel and unusual punishment under the 8th, amendment of the United States Constitution, to receive a harsher sentence than what the law requires, as demonstrated above.

Further, the 14th, Amendment of the United States Constitution guarantees petitioner that he will receive equal protection of the law, and will not be denied life liberty, or property, without due process of the law.

For petitioners sentence to stand as is, would be to denie petitioner those rights, as petitioner is entitled, pursuant to relevant above demonstrated laws(13A.).

Just as so demonstrated in Burgess (iv. above)id., to a sentence reduction, as having one prior felony, conviction, pursuant to 13A-5-9,(a)(1), Ala. Code 1975, with with respects to 13A-5-4,(a); 13A-5-6, (a)(2),Ala. Code 1975 as demonstrated above.

Herefore, Petitioner believes it is warranted to said reduction of sentence to reflect two to twenty years; Or in the alternative, due the above described violations and Grounds reflecting petitioners innocence, a vacated conviction, or reduce to minimum with time served.

EXHIBIT "M"

IN THE CIRCUIT COURT OF
PIKE COUNTY, ALABAMA

KENNETH REX PRICE,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

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CASE NO: CC-2002-134 & 136

ORDER

This matter comes before this court by Petitioner for Relief from Conviction or Sentence pursuant to Rule 32, Alabama Rules of Criminal Procedure, the State's Response and the Petitioners Response to the State's Response.

The court find that the Petitioner raised the issue of ineffective assistance of trial counsel in his Brief on appeal to the Alabama Court of Criminal Appeals. The court further finds the Petitioner raised in his brief on appeal the same or similar issues regarding ineffective assistance of trial counsel that are raised in this Rule 32 Petition. The Court of Criminal Appeals ruled on the merits and affirmed the conviction. The Alabama Supreme Court denied the Writ of Petition for Writ of Certiorari. All of the issues raised in the Rule 32 Petition was addressed in the Petitioners appeal, with the exception of ineffective assistance of appellant counsel.

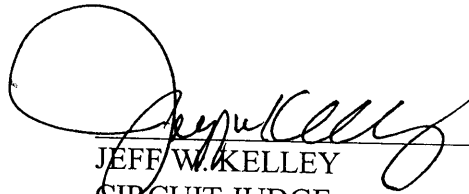
It is **ORDERED** that all of the grounds raised by the Petitioner in this Rule 32 Petition, (excluding ineffective assistance of counsel) are precluded as they were raised or addressed on appeal. With regards to the issue/ground of ineffective assistance of appellant counsel the court finds that the Petitioner alleges that appellant counsel was ineffective because he did not raise certain issues on appeal. The issues the Petitioner claims that appellant counsel did not raise on appeal were the same issues the Petitioner addressed in his Brief to the Court of Criminal Appeals and ruled on by the Court of Criminal Appeals.

The court finds that there is no merit to the Petitioner's allegations in ineffective assistance of appellant counsel as the Court of Criminal Appeals has determined trial counsel was not ineffective, regarding the same issues.

EXHIBIT "M"

Based upon the above the Rule 32 Petition is summarily **DENIED**.

Done this the 17th day of June, 2005.


JEFF W. KELLEY
CIRCUIT JUDGE

